

STATE OF MICHIGAN
COURT OF APPEALS

RANDOLPH MCDANIEL,

Plaintiff-Appellant,

and

LINDA MCDANIEL,

Plaintiff,

v

REBECCA THOMAS,

Defendant-Appellee,

and

PROGRESSIVE HALCYON INSURANCE
COMPANY and JOHN DOE,

Defendants.

UNPUBLISHED

August 5, 2008

No. 278396

Wayne Circuit Court

LC No. 05-517115-NF

Before: Owens, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's¹ motion for summary disposition on the grounds that plaintiff's claim was barred by the statute of limitations. We affirm.

On June 10, 2002, plaintiff was involved in a car accident with defendant that resulted in plaintiff sustaining personal injuries requiring surgical intervention. Defendant filed for bankruptcy on June 1, 2005, but provided no notice to plaintiff. On June 9, 2005, one day before the statute of limitations ran, plaintiff filed his complaint in Wayne Circuit Court against defendant. Plaintiff had difficulty serving defendant and, on August 26, 2005, requested an

¹ Because plaintiff only appeals as to defendant Rebecca Thomas, all references to defendant are to her.

extension of the summons. The trial court granted plaintiff's request and extended the summons until October 7, 2005. On September 15, 2005, defendant's bankruptcy attorney contacted plaintiff's counsel by telephone and sent a confirming letter advising that defendant had filed Chapter 7 bankruptcy proceedings which automatically stayed all litigation involving defendant. Defendant's bankruptcy discharge was entered September 27, 2005. Defendant was personally served in the present litigation on October 6, 2005.

On November 14, 2005, defendant filed an answer, a jury demand, and affirmative defenses. One of the affirmative defenses was that the trial court lacked jurisdiction over the subject matter. On March 2, 2006, defendant filed for summary judgment under MCR 2.116(C)(8) and (10). The trial court granted summary disposition for defendant, finding that the statute of limitations had run because plaintiff failed to refile his claim during the 30-day window after the stay expired as provided in 11 USCS § 108.

Plaintiff first argues on appeal that the statute of limitations on his claim was not expired at the time of service on defendant. However, service and the duration of the summons are irrelevant to the issue at hand. Under 11 USCS § 362(a)(1), defendant's bankruptcy petition operated as a stay against "the commencement . . . of a judicial . . . action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy action]." Plaintiff was not without a remedy, however. Under 11 USCS § 108(c), "if applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such a period has not expired before the date of the filing of the petition, then such period does not expire until the later of— (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the termination or expiration of the stay under section 362" Because defendant filed for bankruptcy before the three-year statute of limitations ran on plaintiff's claim, MCL 600.5805(10), plaintiff's claim fell with the protection of the statute. Taking the longer of the two provisions, the statute of limitations on plaintiff's claim did not expire until 30 days after the notice of termination or expiration of the stay to refile his claim. 11 USCS § 108(c).

Plaintiff's fundamental misunderstanding of the issues is best reflected in his claim that "[b]ecause of the bankruptcy code's tolling provision, Plaintiff's complaint and his summons must be treated as though they were filed on the first day they could have been, September 28, 2005."² This statement is provided without authority and, indeed, is contrary the applicable case law and statutes. The parties agree that plaintiff filed his claim during the automatic bankruptcy stay. "[A]ctions taken in violation of the stay are invalid and voidable and shall be voided absent limited equitable circumstances." *Easley v Pettibone Mich Corp*, 990 F2d 905, 911 (CA 6, 1993). Accordingly, plaintiff's filing was invalid and voidable. *Id.* Once the September 15, 2005, letter notified plaintiff that there was a bankruptcy proceeding and that his filing was in violation of the automatic stay, plaintiff had several avenues available to him. Plaintiff could have requested the bankruptcy court to modify the automatic stay to permit his action against

² The day the stay expired based on the bankruptcy court's September 27, 2005 discharge.

defendant pursuant to 11 USCS § 362(d). *Id.* at 909-910. Alternatively, the statute of limitations was extended 30 days after the notice of termination or expiration of the automatic stay, and plaintiff was permitted to refile his claim with the circuit court during that time. *Id.* at 912; see also *Ashby v Byrnes*, 251 Mich App 537, 542-544; 651 NW2d 922 (2002), overruled on other grounds by *Mayberry v Gen Orthopedics, PC*, 474 Mich 1; 704 NW2d 69 (2005). Plaintiff did neither, instead requesting extensions on the summons of his invalid petition.

Plaintiff asserted at oral argument that he received no notice of the termination of stay. Under 11 USCS § 108(c)(2), the 30 days runs “after notice of the termination or expiration of the stay under section 362.” Section 362(c)(2)(C) provides that the stay automatically ends upon the grant of a discharge. A letter dated October 6, 2005, provided to counsel for plaintiff a copy of the bankruptcy discharge and stated, “the automatic stay is lifted.” Thus, plaintiff had notice of the expiration of the stay under section 362, and the 30 days began to run. Even assuming this letter did not constitute proper notice, as noted by the trial court, plaintiff filed a motion in the bankruptcy court on June 21, 2006, requesting the case be reopened. By its very nature, such a request implies knowledge that the case was closed, and closure of the case also extinguishes the stay. 11 USCS § 362(c)(2)(A). Therefore, we conclude that plaintiff had notice of the end of the stay, the 30 days provided in 11 USCS § 108(c) commenced, and plaintiff failed to refile his complaint within those 30 days.

Moreover, contrary to plaintiff’s assertions, the circumstances in this case do not rise to the level required to constitute “equitable circumstances” that would avoid the voiding of plaintiff’s complaint. *Easley, supra* at 911. Where a plaintiff has notice of the bankruptcy proceeding and has been advised that his action is in violation of the stay, the loss of a claim for failure to refile is insufficient prejudice to constitute an equitable exception. *Id.* at 912. In the present case, plaintiff was clearly advised on September 15, 2005, of the existence of the bankruptcy proceeding and informed that his filing was in violation of the automatic stay. Defendant also did not “lull” plaintiff into believing she would not rely on the automatic stay. Defendant’s bankruptcy counsel notified plaintiff of the automatic stay and one of her affirmative defenses was lack of jurisdiction. Plaintiff’s allegations that defendant engaged in “evasive tactics to avoid service” are inapposite. Even if plaintiff had managed to serve defendant on the first day the summons was issued, his claim was still filed in violation of the automatic stay and would have needed either authorization to continue by the bankruptcy court, 11 USCS 362(d), or to be refiled within 30 days of the expiration of the stay, 11 USCS § 108(c). Because plaintiff did neither, the circuit court had no jurisdiction over the invalid petition, the statute of limitations expired on October 27, 2005, and plaintiff lost his claim. *Easley, supra* at 912. Accordingly, the trial court properly granted summary disposition to defendant.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O’Connell
/s/ Alton T. Davis